No. 457

Supreme Court of the United States

OCTOBER TERM, 1920

OGLESBY GROCERY COMPANY,
Plaintiff in Error,

versus

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

By

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SUBJECT INDEX

PART I.

General Statement of the Case.

PART II.

First Group of Errors, Price Fixing Generally.

PART III.

SECOND GROUP OF ERRORS, PRICE FIXING, VALUE AND COST.

PART IV.

THIRD GROUP OF ERRORS, RELATING TO THE TRIAL.

PART V.

FOURTH GROUP OF ERRORS, CONSTITUTIONAL QUESTIONS.

TABLE OF CASES

AUTHORS

PART I.

General Statement of the Case.

(a) *The Statute.*

The Congress on August 10, 1917, Chapter 53, enacted a statute entitled,

> An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel. (40 Stat. C. 53, page 276.)

Section 5 of this Act, so far as it is here material, authorizes the President when he

> shall find it essential, to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act.

This section further provides:

> Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice. The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory and fair storage charge, com-

mission, profit, or practice, and in any proceeding brought in any court such order of the President shall be *prima facie* evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or wilfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall upon conviction thereof, be punished by a fine not exceeding $5,000.00, or by imprisonment for not more than two years or both: Provided, That this section shall not apply to any farmer, gardener, cooperative association of farmers or gardeners, including live-stock farmers, or other persons with respect to the products of any farm, garden, or other land owned, leased, or cultivated by him, nor to any retailer with respect to retail business actually conducted by him. (40 Stat. C. 53, Sec. 5, page 277.)

Section 4 of the Act entitled as above was amended October 22, 1919 (Statutes United States, 66th Congress, Session 1, Chapter 80, p. 298), by providing a punishment for what had been denounced as unlawful in the original section.

(*b*) *Section Under Which Indictment was Found.*

Section 4, as amended, so far as is here material, provides:

> That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any

necessaries * * *. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000.00 or be imprisoned for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.

(*c*) *Indictment.*

In the United States District Court for the Northern Division of the Northern District of Georgia, holding sessions at Atlanta, a grand jury, on April 27, 1920, returned a bill of indictment against Plaintiff in error, Oglesby Grocery Company, charging in four counts, violations of section 4.

The allegations in all counts are substantially similar, differing only in the name of the person to whom the sale was made. The relevant allegations are:

> That Oglesby Grocery Company, a corporation, on the 13th day of April, in the year 1920, * * * during the existence of a state of war between the United States of America, and the German Government, did then and there unlawfully and wilfully make an unjust and unreasonable charge in handling and dealing in certain necessaries, to-wit: granulated sugar * * * and did make a charge of twenty cents per pound

therefor, when and while seventeen and three-fourths cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust and unreasonable, the said Oglesby Grocery Company, lately theretofore having purchased the said sugar from the Savannah Sugar Refining Company at the price of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta being twenty-six and nine-tenths (26.9) cents per hundred pounds.
* * *

(*d*) *Demurrer.*

A general demurrer was filed. In the discussion of this demurrer it was claimed that no crime was charged and that the Act of Congress upon which the prosecution was based was void because in conflict with the Constitution of the United States. On May 6, 1920, this demurrer was overruled and exception taken.

(*e*) *Trial, Verdict and Judgment.*

The trial began June 3, and was concluded June 8, 1920. A verdict of guilty on all four counts was rendered and a fine assessed of $2,000.00 (rec., 9). It having been contended by the defendant below that the statute on which the prosecution is based is unconstitutional and void, this appeal was taken direct from the District Court to this Court (rec., 10).

(*f*) *Facts Established.*

Defendant bought sugar which cost, f. o. b. cars Atlanta, 16.269 cents per pound; on April 13, 1920, the day the

sugar was sold it was worth in Atlanta over 24 cents a pound and that the sales of sugar were made in the name of Oglesby Grocery Company, on the date alleged, at 20 cents per pound. The evidence showed that it cost from 10 cents to 25 cents a 100 pounds to deliver the sugar from cars to warehouse, and about the same to make deliveries to retailers (rec., 51, 59). The testimony is silent as to the cost of handling this particular sugar. The sales were made on credit and deliveries were made by the seller to the retailers.

On May 21, 1920, the Department of Justice defined cost as follows:

(*g*) *Cost Defined.*

> Cost is invoice price plus freight to dealer's point, plus interest attributable to the particular purchase, plus delivery from car to warehouse, and wholesaler may make retailer come to warehouse or pay the cost of delivery therefrom, plus any other charge attributable to the particular purchase prior to its reaching wholesaler's warehouse. (Rec., 43.)

Prior to April 20, 1920, the Fair Price Committee of Georgia fixed for wholesalers a profit on sugar over invoice cost and freight of one cent a pound. On April 20th this committee, using the same basis, fixed the profit at one and a half cents. Thereafter and before May 25, 1920, the Attorney General's direction, that profits be reduced to one cent, was communicated to the Fair Price Committee in Atlanta (rec., 31). No notice was given to Plaintiff in error that either such profit was to be fixed; nor did Plaintiff in error have any hearing, nor was it consulted when either was fixed; nor was any other than newspaper notice given when profits were fixed or changed.

(h) Different Rates of Profit Fixed.

The indictment alleged, if "charge" is construed to mean price, that the profit over invoice cost and freight should be 1.481 cents a pound.

The Fair Price Committee fixed a profit over invoice cost and freight of 1.50 cents a pound.

The Department of Justice fixed a profit over invoice cost, freight, cartage, insurance, interest, delivery and other charges applicable to a particular purchase, of 1 cent a pound.

The two profits, first named above, agree as to cost but differ as to the amount; the third differs from each of the former, both as to cost and amount. Probably the profit fixed by the Department of Justice exceeds, when "cost" as defined by that Department is considered, that charged in the indictment as well as that announced by the Fair Price Committee April 20, 1920.

(i) Market Value or Cost as a Basis to Which to Add a Profit.

Proof that it was the general custom to base sales on market or replacement value was made, and the custom was admitted to exist by the District Attorney.

Plaintiff in error insisted on the trial that even if a definite profit were fixed such profit should be added to the value of its property. Sugar on April 13, 1920, was freely offered in Atlanta; but none was being allocated by the refineries. The then method by which refineries sold sugar was to ship to former customers their pro rata amount when and to the extent available, basing the allocation on

the normal purchases of such customers. On this date sugar was offered from several sources, and some was bought at wholesale at prices delivered in Atlanta, which ranged from 24 to 29 cents per pound.

Plaintiff in error contended that the market value of his sugar on April 13, 1920, exceeded 20 cents a pound, and was at least 24 cents; and that value rather than cost should be used as the figure to which should be added whatever was a reasonable rate or charge for handling or dealing in sugar. Charges embodying this contention were asked and refused and exception taken. The Court charged that the

> "Just and reasonable rate", fixed by the President through the agency of the Attorney General, and also through the agency of the Fair Price Commission,

was admitted for

> What you (the jury) think it is worth. It is not conclusive; it is not a judgment * * * * It is admitted only as *prima facie.*

(*j*) *Assigned Errors Logically Grouped.*

The assigned errors fall into four groups, as follows:

1. Those denying the right of administrative agencies to fix prices which could properly be considered in this case.

2. Errors relating to the failure to consider value in determining selling price and a like failure in submitting the issues to the jury.

3. Errors other than those already specified in admit-

ting or rejecting evidence and in giving and refusing charges.

4. Constitutional questions arising from the claim that the statute on which the indictment is based is void because in violation of the Constitution of the United States.

PART II

First Group of Errors, Price Fixing Generally.

Section 1. Statement of This Part of the Case.

(a) Price Fixing.

On the trial proof was received, over objection, of margins of profit considered by administrative agencies to be just and reasonable; requests were made to charge that the fixation of such margins was void and charges were given to the effect that margins so fixed were *prima facie* correct. The specific errors in the assignment of errors filed herein which constitute group one (rec., 10-13) are:

(b) Assignment of Errors, Group One.

1.

Because the Court erred in admitting testimony, for that during the trial of said case, counsel for the United States asked John A. Manget, a witness for the government and chairman of the Fair Price Committee for Georgia, to explain to the jury just what the plan of action of said committee was in fixing prices and what efforts were made by the committee to carry out such plan.

Counsel for the defendant in the court below, Plaintiff in error here, then and there objected to said question on the grounds that the same was immaterial and irrelevant, that no action of the Fair Price Committee was relevant or binding on the defendant, that said Fair Price Committee had no legal function to perform in relation to the issues of the case on trial and that the bill of indictment did not charge a violation of the price fixed by the Fair Price Committee.

Said objection was overruled by the Court, and the witness permitted to answer and to testify that the Fair Price Committee, after giving public notice through the newspapers, determined that it was a fair profit, prior to April 20, 1920, for wholesale grocers to receive in selling sugar 1 cent per pound in excess of the invoice cost and freight on the sugar; that on April 20th said committee increased said margin of profit to 1½ cents per pound, and that thereafter, about May 1, 1920, under direction from the Attorney General of the United States said profit was decreased to 1 cent per pound.

To the ruling of the Court in permitting said testimony, defendant in the court below, Plaintiff in error here, then and there excepted and said exception was noted and allowed and said testimony received.

2.

The Court erred in admitting testimony, for that during the trial of said case counsel for the United States asked Miss Emma T. Martin, secretary of the Fair Price Committee, a witness for the government, to read in evidence from her notes what occurred with reference to fixing a price on sugar sold by wholesale grocers.

Counsel for the defendant in the court below, Plaintiff in error here, then and there objected to said question and urged the objection that the best evidence was the minutes themselves; that the notes taken therefrom were secondary evidence; and that such testimony was incompetent, immaterial and irrelevant, because the Fair Price Committee had no authority to fix a price binding on the defendant.

Said objection was overruled by the Court, and the wit-

ness permitted to testify that the Fair Price Committee had a sub-committee on sugar, composed of a sugar broker, a retail grocer, and a wholesale grocer, which sub-committee recommended to the Fair Price Committee the price at which sugar could be sold by wholesale grocers; that said Fair Price Committee on such recommendation in October, 1919, fixed a profit of 1 cent per pound for wholesale grocers over the invoice cost and freight; that such profit remained until April 20, 1920, when the profit was fixed at 1½ cents per pound, which remained the profit until about May 1, 1920, when under order from the Department of Justice, the profit was reduced to 1 cent per pound.

To this ruling of the Court, permitting the testimony of Miss Martin, defendant in the court below, Plaintiff in error here, then and there excepted and said exception was noted and allowed.

3.

During the trial of said case, the government offered in evidence the written appointment of John A. Manget, a witness for the government, as a Fair Price Commissioner for Georgia.

Without questioning the execution of the paper constituting the appointment, counsel for defendant, Oglesby Grocery Company, then and there objected to the introduction of the certificate of appointment, because same was immaterial and irrelevant, and because the Fair Price Committee, of which said Manget was chairman, had no function under the provisions of the law under which the indictment in this case was found, the functions of said committee being limited to Section 5 of the Act of Congress of Aug. 10, 1917.

Said objection was overruled by the Court, and the certificate of appointment introduced and read to the jury.

To this ruling, counsel for defendant, Ogiesby Grocery Company, Plaintiff in error here, then and there excepted, and said exception was noted and allowed.

4.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"Neither the so-called profit of 1 cent per pound, nor the profit of 1⅓ cents per pound, claimed by the Fair Price Committee to have been fixed as reasonable in the sale of sugar, is valid, there having been no notice to defendant, defendant not having been heard when said charge, or charges were fixed, and the committee not having considered all the elements of the cost."

5.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"You are further charged that because in fixing such charge no consideration was given to value, the charge fixed by the committee is void."

6.

Because the Court erred in charging the jury, exception being properly taken, as follows:

"The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General, and also through the agency of the Fair Price Commission at Atlanta. Evidence has been introduced as to what those agencies of the President had determined to be a fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as *prima facie* evidence as to what the Attorney General and the Fair Price Committee decided was just and reasonable."

7.

Because the Court erred in charging the jury, exception being properly taken, as follows:

"This Section 5 of the Act authorizes the President through such agencies to determine what is a just and reasonable profit, the language is not 'a just and reasonable rate', and it is a little different. Just and reasonable profit—that word 'profit' might have a good many significations in the minds of different people. One man might say that profit is the difference between what a commodity cost and what it is sold for. That is what I have told you that the rate and charge was. Another man might think that ought not to be considered profit but that profit is only what a man gets clear, after paying all his expenses of every sort in connection with it. Here it becomes important, therefore, in considering the finding, both of the Attorney General and the Fair Price Committee, to know what they thought profit was and in looking at all the circumstances they dealt with; you have to know

that in order to tell how much the compensation ought to be and what they found."

8.

During the trial of said case, counsel for the defendant, Oglesby Grocery Company, offered in evidence a stipulation between the Attorney for the United States in this case and defendant, that F. M. Spencer, special agent in charge representing the Department of Justice, on Aug. 28, 1919, mailed out to wholesale grocers in the State of Texas a letter, signed by himself, asking grocers to report among other things the cost of their commodities, and telling grocers that the cost price expected to be used was the market or replacement value as of the date such report was to be made.

Counsel for the Government objected to the introduction of said letter and statement and urged that the same was immaterial and irrelevant.

Which objection was sustained by the Court and the Court refused to permit the introduction of said stipulation, letter and statement.

To this ruling, counsel for the defendant, Oglesby Grocery Company, Plaintiff in error here, then and there excepted, and said exception was noted and allowed.

(c) *Summary of Errors Relating to Price Fixing.*

The errors stated in the foregoing eight divisions of the assignment of errors may be subdivided into specifications, as follows:

1. The grant of power to the President to fix prices gives no authority to determine what is a reasonable

rate or charge under Section 4 of the Food Control Act.

2. No price or margin fixed by the President or any agency by him designated can be relied on by the government in this prosecution because there was no allegation in the indictment that such price, or margin, had been fixed.

3. The uncertainty as to what was the price or margin which had been determined on by agencies of the President renders all such prices and margins void.

4. The price or margin being determined without any notice or hearing to plaintiff in error is void and to give any effect thereto in this prosecution is to deprive plaintiff in error of its rights under the Constitution of the United States.

5. The price or margin is invalid and to give effect thereto takes property for a public use without compensation, and denies plaintiff in error due process of law because the value of the property sold was disregarded.

6. The practice of the Department of Justice should have been admitted.

These several groups will be separately discussed.

SECTION 2. ARGUMENT, AND AUTHORITIES.

(a) *No Power to Fix a Rate or Charge.*

Section 5 of the Food Control Act (see provisions copied ante p. 1) gives the President power

(1) To require certain licenses to be obtained.

(2) To require reports from licensees.

(3) To determine whether or not a storage charge, a commission, a *profit*, or a practice is unjust or unreasonable.

(4) To find, when a profit is determined to be unjust or unreasonable, that the licensee shall, after reasonable notice, desist from charging such unreasonable profit and in lieu of what was condemned the President may fix what is a just and reasonable profit.

The effect of such finding is that,

(5) Such order to cease and desist is *prima facie* valid.

(6) A disobedience of such order to cease and desist shall authorize a cancellation of the license.

(7) And that a disobedience of such order and the doing of business without license shall constitute crimes.

Section 4 is unlike Section 5. Section 5 in effect creates administrative agencies with power, after hearing, to decide as to past conduct and to substitute a rule of action for the future. The decision and the rule are *prima facie* evidence.

Secion 4 makes unlawful without any administrative action any unjust or unreasonable *rate* or *charge*. Rate, charge, profit, and price are loosely used interchangeably, but here these words have distinct meanings. "Rate" and "charge" of Section 4 are used in the Interstate Commerce Act and in standard works on economics and refer to the compensation for a service. "Profit" used in Section 5 means what is left to the merchant after deducting cost of goods and cost of doing business. Price is used in Sections 4, 6, and 25, and means what is "given in exchange for a

commodity," the "expression of exchange value in terms of money." Ely, Outlines of Economics, 3rd Ed., 152.

To make Section 5 apply the Government contends that "profit" used therein means rate or charge; and to make the indictment good in the allegation that 17¾ cents per pound is a "just and reasonable charge", "charge" is construed to mean "price".

Combinations to "enhance the *price*" and to "exact excessive prices" are condemned in Section 4. The Congress in this section uses "price" and "prices" and "rate" and "charge". It is presumed that these words were used in their technical sense and the Court erred in giving one meaning to the several terms.

The original Act provided no penalty for violations of Section 4. If the learned Trial Judge was right in holding that a violation of a "profit" fixed under Section 5 is a violation of an inhibition of an unreasonable rate or charge under Section 4, there is no reason for providing an exactly similar penalty for a violation of the latter section. That the learned Trial Judge erred in his construction of Sections 4 and 5 is made apparent by the amendment to Section 4 of October 22, 1919. The Congress will not be presumed to have done a meaningless and useless thing.

The administrative agencies which the President may use have no authority whatsoever, except in cases where a particular licensee is believed to be making unreasonable profits or indulging in unjust or unreasonable practices. Section 5 is somewhat like the original Interstate Commerce Act, and the discussion by this Court in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 509, 42 L. Ed., 243, 251, 256, 17 Sup. Ct. 896, is applicable here. It was there stated:

> It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country. And if it had intended to grant the power to establish rates, it would have said so in unmistakable terms.

If the Attorney General or the several so-called Fair Price Commissions were to have power by drawing on their consciousness alone to fix a standard of reasonableness which merchants must know at their peril, Congress surely would have said so in unmistakable language.

(*b*) *If Lawfully a Selling Price, a Profit or a Rate or Charge Could Be Fixed; To Admit Evidence Thereof the Fixation Should Be Pleaded.*

The indictment alleges that 17¾ cents is a reasonable *rate* or *charge*. This allegation, taken with the statement of cost of the sugar sold might be construed to mean that 1.481 cents per pound should be added to the invoice cost and freight to make a selling price. Literally it means that 17¾ cents added as a charge to the cost makes a reasonable selling price, and that a selling price of 34.019 cents a pound was just and reasonable. The alleged crime is a statutory one, is vaguely and indefinably defined and is one formerly unknown to our law. The rule requiring "precision and certainty" in indictments should be applied with the greatest strictness in this case. In *Ledbetter v. United States*, 170 U. S. 606, 42 L. Ed. 1162, 18 Sup. Ct. 774, citing:

United States v. Cook, 84 U. S., 17 Wall. 168, 174, 21 L. Ed., 538, 539; *United States v. Cruikshank*, 92 U. S.

542, 558, 23 L. Ed. 588, 593; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516, 8 Sup. Ct. 571; *Pettibone v. United States*, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. 542 and *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 Sup. Ct. 934, this Court said:

> Where the crime is a statutory one, it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the Court of the exact offense intended to be charged.

No allegation whatsoever is made as to the fixing of profit, price, rate, or charge by any agency of the President. Such an allegation is necessary.

> *United States v. Pennsylvania Central Coal Company*, 256 Fed. 703, 706; *United States v. Ford*, 263 Fed. 449.

In *Weed & Co. v. Lockwood*, —— Fed. ——, reversing same styled case, 264 Fed. 453, the Circuit Court of Appeals, speaking of orders of the President fixing prices, said:

> Such orders, if issued, would not add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. (*United States v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449, 25 Sup. Ct. 222.) He can neither abridge nor enlarge the criminal responsibilities under the statute. Indeed, it is obvious that he could not fix a maximum rate of charge on wearing apparel as a foundation for

laying indictments. The statute fixes it in the terms of unjust and unreasonable rates and charges.

(c) *Differing Selling Prices Being Pleaded and Fixed, No Selling Price Is Binding.*

As stated (ante p. 6) the indictment as construed by the Court, fixes 1.481 cents and the Fair Price Committee 1.50 cents per pound over invoice price and freight as a maximum selling price; while the Department of Justice adds one cent to cost, defining cost as including items disregarded in the indictment and by the Fair Price Committee.

(d) *No Hearing Having Been Accorded Defendant in Error, No Price Fixed by an Administrative Agency Can Be Used in Any Way to Affect Its Rights Herein.*

The Court told the jury (rec., 76) and the undisputed facts show that the so-called profit fixed by the Fair Price Committee and the one fixed by the Attorney General were fixed without any notice to or hearing granted plaintiff in error.

Administrative orders are invalid for any one of the following grounds:

(1) That the order violates some provision of the Constitution of the United States; (2) That in making the order the Commission has relied on some mistake of law; (3) That the order is not included within the powers conferred by the statute upon the Commission; (4) That the order is, although in form correct, in substance so unreasonable as to violate the law; (5) That the legal effect of

undisputed testimony has been disregarded by the Commission; (6) That a full hearing was not had before the order was entered. *Interstate Commerce Commission v. Illinois Central R. Co.* 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155. Mr. Justice Lamar stated these grounds somewhat differently but in substance the same in *Int. Com. Com. v. Union Pac. R. Co.* 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108. See also *Florida East Coast R. Co. v. U. S.* 234 U. S. 167, 58 L. Ed. 1267, 34 Sup. Ct. 867; *Int. Com. Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185; *Louisville & N. R. Co. v. U. S.*, 238 U. S. 1, 59 L. Ed. 1177, 35 Sup. Ct. 696.

In *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, this Court, in discussing an order of the Interstate Commerce Commission, said:

> A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> In the comparatively few cases in which such questions have arisen it has been distinctively recognized that administrative orders, quasi-judicial in character, are void, if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence

> * * * *, or if the facts do not as a matter of law support the order made.

Tang Tun v. Edsell, 223 U. S. 673, 681, 56 L. Ed. 606, 32 Sup. Ct. 359; *Chin Yow v. U. S.*, 208 U. S. 8, 52 L. Ed. 369, 28 Sup. Ct. 201; *Low Wah Suey v. Backus*, 225 U. S. 460, 468, 56 L. Ed. 1165, 32 Sup. Ct. 734; *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. Ed. 218, 33 Sup. Ct. 31; *United States v. B. & O. S. W. R. R.*, 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5, 9; *Atlantic C. L. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301, 45 L. Ed. 194, 21 Sup. Ct. 115.

(e) *A Requirement that Sugar Shall Be Sold at Less Than Its Market Value Takes Private Property for A Public Use Without Compensation.*

The evidence authorized a finding that the sugar alleged to have been sold by plaintiff in error for 20 cents a pound was worth and would have cost when sold not less than 24 cents a pound, 6¼ cents more than the price for which the Government says it should have been sold.

On April 12, 1920, according to the Fair Price Committee chairman, a witness for the United States, the price was 25¾ cents per pound (rec., 26). The sale was alleged to have been made April 13, 1920 (rec., 1). The Attorney for the Government admits that

> "Sugar was actually offered and actually sold in Atlanta to *wholesalers* at higher prices"

than 20 cents a pound (rec., 35).

Another witness testified that on April 13, 1920, the price to wholesalers was "around 25 cents at New Orleans"

(rec., 46). A lower grade sugar was offered at New Orleans on April 12, 1920, at 24 cents (rec., 35). On April 12 another witness said sugar could be bought from 24 to 25 cents and that afterwards the price went to about 28 cents (rec., 50). Mexican granulated sugar, net New Orleans, was offered April 12th at 28 cents (rec., 51). Argentine granulated on the same day was offered with banker's guarantee at 23 cents New Orleans (rec., 51, 52). On April 16 the price of Nicaragua granulated was 27½ cents f. o. b. New Orleans with an irrevocable letter of credit (rec., 56). Plaintiff in error could get no quotation from regular sources on April 12, 1920 (rec., 64, 65).

The owner of a particular commodity owns all its "value." The purchase of goods at a particular cost is evidence which may aid in determining value, but there is no necessary connection between cost and value. Jevons (Theory of Political Economy, p. 164) rejects entirely the element of cost. He says:

> "The fact is that labor once spent has no influence on the future value of any article; it is lost and gone forever. In commerce bygones are forever bygones; and we are always starting clear at each moment, judging the value of things with a view to future utility."

Cost paid, like labor spent in production, is "gone forever." Value may be less or more than cost, but value is what can not be taken for public use without compensation, and in the taking there must be due process of law.

In *New York v. Sage*, 239 U. S. 57, 61, 60 L. Ed. 143, 146, 36 Sup. Ct. 25, this Court defines value to mean

> What it fairly may be believed that a purchaser in fair market conditions would have given for it * * * *. Any rise in value before the taking * * * * is to be

> allowed, but * * * * it must be a rise in what a purchaser might be expected to give.

Ashley (English Economic History and Theory, Vol. I, Part I, Book I, Chap. III, p. 140) says:

> Value is something entirely subjective; it is what each individual cares to give for a thing.

Sedgwick (Principles of Pol. Econ., Book II, Chap. 2) says:

> Cost of production cannot be assumed to be independent of demand.

This is a correct propositon because cost of production or of buying can not determine the selling price. That price may be above or below the cost as the demand determines is a fact that economists since mediaeval times have all recognized. Even in mediaeval times "common estimation", which means much the same as "market price", was resorted to to decide what was the *justem pretium*. Cunningham (Growth of English Industry and Commerce. 5th Ed., Early and Middle Ages, pp. 253, 254) discusses the treatment of the subject by S. Thomas Aquinas and compares the canonical with the present economic theories. He says:

> The just price is known by the common estimation of what the thing is worth; it is known by public opinion as to what it is right to give for that article, under ordinary circumstances.
>
> So far we have a parallel with modern doctrine; the mediaeval "just price" was an abstract conception of what is right under ordinary circumstances—it was admittedly vague, but it was interpreted by common estimation. Modern doctrine starts with a "normal" value which is "natural" in a regime of free com-

petition; this, too, is a purely abstract conception, and in order to apply it we must look at common estimation as it is shown in the prices actually paid over a period when there was no disturbing cause.

Common estimation is thus the exponent of the natural or normal or just price according to either the mediaeval or the modern view; but whereas we rely on the "higgling of the market" as the means of bringing out what is the common estimate of any object. Mediaeval economists believed that it was possible to bring common estimation into operation beforehand, and by the consultation of experts to calculate out what was the right price. If "common estimation" was thus organized, either by the town authorities or gilds or parliament, it was possible to determine beforehand what the price should be and to lay down a rule to this effect; in modern times we can only look back on the competition prices and say by reflection what the common estimation has been.

* * * *

Prices assigned by common estimation would sometimes be high and sometimes low, according as an article was plentiful or not; the just price varied from time to time for such commodities. Nor was it unjust for a man to sell an article for more than he had paid for it as its just price, if there had been a change of circumstances.

The several margins of profit stated in the indictment, in the findings of the Fair Price Committee and in the findings of the Attorney General, all disregard present market value. Cost is made the controlling basis. Such action violates the Constitution of the United States.

Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 91, 46 L. Ed. 92, 102, 22 Sup. Ct. Rep. 30;

Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, Ann. Cas. 1916 A 18, 48 L. R. A. (N. S.) 1151;

United States ex rel. Kansas City So. Ry. Co. v. Interstate Commerce Commission, 251 U. S. 178, 64 L. Ed. ——.

On this subject District Judge Holmes in *Kennington v. Palmer*, —— Fed. ——, not yet reported, said:

> The next question is whether or not an unjust or unreasonable rate or charge has been made. In deciding this question you will not be concluded by any price or margin of profit fixed or allowed by any committee or agency of the Government, but you will take into consideration all competent evidence which may be available tending to show what is a just and reasonable charge. The test of reasonableness must be applied to all regulations and orders issued to carry out the act, and any regulation requiring the seller to disregard the real market value of the article and to sell at the original price paid therefor plus an arbitrary fixed percentage as profit is unreasonable and void, as in many cases such regulations would confiscate property rights which have become fixed and vested.
>
> You will observe, also, that Congress has not seen fit to make it an indictable offense to disregard any order or regulation of the Fair Price Committee, but has provided a penalty only for a violation of some provision of the act itself. The price that the merchant paid for his goods is not conclusive, but is a mere circumstance tending to show its present value. Although you may consider the price he paid along

with the other evidence, you should consider also, and I think should give more weight to, the replacement value of the article than to the original cost. Particularly is this true if there has been a material change in the market price of the goods. • • • • When you come to decide whether or not any price has been an unjust or unreasonable charge you will decide that by determining the fair market price of the article at the time the rate or charge is made. You will not take into consideration pre-war prices or prices at any other time. You should not speculate upon what the price of the article should be or ought to be. The question for you to determine is what in fact at the time of the sale or the effort to sell is the fair market price of the article, and has an unjust and unreasonable charge over and above the fair market price been made.

(f) The Practice of the Department of Justice Was Admissible.

As shown in error No. 8 (ante 14), an agent of the Department of Justice told wholesale grocers in Texas to use replacement value in determining what their stocks of goods were worth. This fact should have gone to the jury for consideration in deciding what was reasonable and in determining whether or not plaintiff in error acted wilfully.

PART III.

Second Group of Errors, Price Fixing.

Section 1. Statement of This Part of the Case.

(a) *Value Can Not Be Disregarded.*

The testimony of J. H. McLaurin, President of the Southern Wholesale Grocers' Association (rec., 41, 42); E. M. Hudson (rec., 44, 45), A. W. Walker (rec., 49), R. W. Davis (rec., 51), Sam Goldstein (rec., 53), Henry Y. McCord (rec., 54), and H. L. Singer (rec., 58), wholesale grocers; J. E. Raley (rec., 34) and E. E. Smith (rec., 56), brokers; Joseph A. McCord, Chairman of the Board of the Federal Reserve Bank, Atlanta (rec., 57), and of T. J. Brooke (rec., 60), a wholesale feed and produce merchant, and of J. H. Bullock (rec., 60), a retail grocer, showed that it was and always had been the custom of wholesale grocers and all other intelligent merchants to increase or decrease their selling prices as the market value of goods increased or decreased. The increase being necessary to make the business a success, and the decrease being the forced result of competition. Merchants, in order properly to serve the public, must endeavor to forecast the future and are compelled to make contracts according to their prophecies. This is speculation, or an operation based on faith in their judgment. The value to the public is in avoiding or mitigating conditions which may arise, in equalizing prices and in providing for periods of want. The equalization of prices resulting from this necessary hazard taken by the merchants means that as both rising and falling prices are encountered sales must be made with due regard to market values at the time of such sales.

(b) Testimony On This Point.

Illustrating the testimony on this point the statements of some witnesses are copied.

Mr. Manget, a witness for the United States, and the Chairman of the Georgia Fair Price Committee, said:

> I have been in the grocery business, wholesale and retail, for the larger part of 35 years—36 years (rec., 22). * * * * The general custom was when the market advanced on a commodity to try to get a little more for it; that was often done. I would not say it was universally done (rec., 26).

The District Attorney (rec., 28) said:

> Mr. Alexander:—I am perfectly willing to admit here that replacement value is the custom in cotton and in nearly everything else.

Mr. J. H. McLaurin has a wide knowledge of the grocery business and knows the custom of the trade. He said (rec., 41, 42):

> I have had occasion to learn what the custom among grocers was as to replacement value in fixing their price; that custom is and has been, the prevailing market value shall rule in fixing the selling price of a commodity; that applies to all lines of groceries. That custom generally applies throughout the country, is my impression. * * * * we recognize replacement value as fundamentally sound on any commodity we are selling; it is an economic principle that underlies all sound business.

Henry Y. McCord, a wise and conscientious wholesale

grocer, whose long experience fits him to speak (rec., 54), testified:

> I have been in the grocery business over thirty-five years. Prior to the outbreak of the European war, I was familiar with the method of doing business of the wholesale grocers in Atlanta and surrounding territory. The method with reference to fixing the price when there was a rise in the price after the goods were bought, was, if there was an advance, we advanced. If there was a decline, we declined with the market. We were forced to do that: I mean where there is a decline but not an advance, but I believe that if we did not advance we would be forced out of business. I think that with any reputable merchant with ability to do much business that was the custom. It is a necessary method of doing business. There are losses, because the prices of goods frequently go down in the wholesale grocery business. We got a car load of stuff last week that cost thirty-four cents, and we were notified that the price was twenty-nine. It is true in the wholesale grocery business that goods go up and down, and a grocer has to buy his goods sometimes ahead of the time he expects to sell them. That being true, it is necessary to go with the market, both up and down.

Mr. Joseph A. McCord, whose experience as a merchant and banker and whose eminence in the banking world give his opinions peculiar value (rec., 57), said:

> From my experience as a merchant and a banker, I am acquainted with the custom of wholesale grocers, and other lines of business, of fixing their sale prices, on the market value at the time of selling. I was acquainted with the custom which I practiced myself in my own business, and I was told what was done in

the wholesale business. I was not in the wholesale business.

The custom was this: that if they bought a shipment and had the shipment come in they based their profit largely upon that shipment. Of course if that shipment came in and in the meantime a decline should happen, they would have to reduce their price or not sell the goods. If the price advanced, they would enhance the price. I was traveling salesman for Abbott Brothers, wholesale grocers, of Atlanta, during the year 1880 and '81.

As a banker I have to keep up with credits, and the way people do business that deal with my bank. From my knowledge as a banker, that custom has been continued since I have been out of business. So far as I know, and we have that very question, because if we find that a house is not living up to good practice we generally watch their credit pretty close. If a man who did not follow that method of doing business, it would depreciate his credit rating in making discounts.

A. W. Walker (rec., 65) said:

The quotations on refined sugar, by the American Sugar Refining Company, is now twenty-two and a half cents. They offer at that price sugar till December 1st, 1920. The effect of that twenty-two and a half cent price on grocers who have bought at twenty-six, seven and eight cents is very depressing. They are facing heavy losses, from my knowledge of the grocery business.

Mr. Walker has, by subsequent events, been more than confirmed, although his statement did not fully indicate the losses which wholesale grocers have since sustained. These

grocers bought sugar as high as 28½ cents a pound and later sold the same sugar as low as 16 cents a pound.

SECTION 2. ASSIGNMENT OF ERRORS, GROUP TWO.

The specific assigned errors in this group (rec. 14, 15) are as follows:

9.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"The Court directs you that in determining what is a just and reasonable charge to be made in handling and dealing in sugar that you must take the value of the sugar at the time the sale was made by the defendant, and if you find that the value of such sugar had increased since it was acquired by defendant, defendant is entitled to the benefit of such increase. If, therefore, you believe from the evidence that the sugar alleged to have been sold in this case was, at the time it was sold, of a market value in excess of that alleged in the indictment or if the Government has failed to prove such value, you will find the defendant not guilty."

10.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"*Value* means what the sugar was worth in the market on the day of the sale. In determining what such value

was, you will consider offers to sell or buy and market quotations and from all the facts determine what was the present value of sugar on April 13, 1920, and the cost to defendant is not a standard of value."

11.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"In determining whether or not the defendant sold sugar at a reasonable rate or charge, you will determine from the evidence first the market value of the sugar at the time it was sold. The fact, if you believe it to be a fact, that the sugar increased in value over what it was bought for, must be considered by you, as you cannot base your verdict solely on the freight charges and amount paid for the sugar."

12.

Because the Court erred in not defining cost and in not giving the request to charge seasonably made in writing, as follows:

"*Cost*, as used in the indictment, and as used throughout this charge means the price paid, or contracted to be paid when the sugar was bought, plus the freight paid to transport said sugar from the place where it was bought to Atlanta, Ga., plus interest on the investment in the sugar, calculated from the time the sugar was paid for until the sale thereof was made; plus the reasonable and necessary charges in removing and delivering the sugar from the car in which it was shipped to the warehouse of the Oglesby Grocery Company; plus the cost of deliver-

ing the sugar from the warehouse of Oglesby Grocery Company to the retail merchant to whom it was sold, plus any other charge attributable to the particular purchase of sugar prior to its reaching the warehouse of Oglesby Grocery Company."

13.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"It is not sufficient evidence of the cost of the sugar for the Government to establish the price paid therefor by Oglesby Grocery Company to the Savannah Sugar Refining Company and the freight paid for transporting said sugar from Savannah to Atlanta."

SECTION 3. SUMMARY OF SECOND GROUP OF ERRORS.

The errors shown in the divisions of the assignment of errors copied next above present specific errors as follows:

(1) In not giving requested charges defining value and requiring that value should be considered in determining selling price. (Nos. 9, 10, 11, above.)

(2) In not defining cost. (Errors Nos. 12 and 13.)

SECTION 4. ARGUMENT, AND AUTHORITIES.

(a) *Value Means Worth in Exchange Whatever the Cost.*

This proposition has already been discussed (ante pp. 28-32) while considering administrative price fixing.

(*b*) *What Cost Is.*

The Department of Justice stated what it meant by cost (ante p. 5) the Chairman of the Fair Price Committee used a different definition of cost. The Court told the jury that what the *agencies* of the President did in fixing a margin over cost was *prima facie* correct. Although one of such agencies, the Department of Justice, made its ruling as to what was a reasonable profit after the sales alleged to have been made were made. One of these agencies used one set of factors to arrive at cost, another used these and several other factors; the one added 1½ cents to the factors used, the other added 1 cent to the augmented factors. The district attorney in drawing the indictment herein was probably trying to use the 1½ cent profit as the established rule but he used instead 1.481 cents.

Whether or not cost should have been defined to the jury as defined by the Department of Justice, it was the duty of the Court to give the jury an opportunity to consider the finding of that department. It is believed that the charges shown in errors 10, 11 and 12 should have been given but certainly the charges shown in errors 9 and 13 should have been given. Not to give these deprived plaintiff in error of the right to have considered material elements of a fair price.

PART IV.

THIRD GROUP OF ERRORS, RELATING TO THE TRIAL.

SECTION 1. STATEMENT OF THIS PART OF THE CASE.

The trial Court refused correctly to define "wilful," a material word used in the statute and the indictment; and the definition which was given is not full or accurate and is confusing.

Losses suffered by wholesale grocers in Atlanta at and near the time the alleged unlawful sale of sugar was made are part of the hazard of doing business, but the Court refused to permit proof of such losses on commodities other than sugar. There was no sufficient testimony to show that plaintiff in error had committed any crime.

This group of errors is assigned in subdivisions 14 to 20 (rec. 15-19) of the assignment of errors and are as follows:

SECTION 2. ASSIGNMENT OF ERRORS, GROUP THIRD.

14.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"'Wilfully,' as used in the indictment, implies on the part of the defendant, a knowledge of the facts, and a purpose to do wrong. It means a voluntary act with a bad purpose, and without ground for believing the Act to be lawful. Before you can convict the defendant, you must

believe from the evidence beyond a reasonable doubt that the defendant knowingly without ground for believing the act to be lawful, with a bad purpose and with a purpose to do wrong, made a sale, or sales, of sugar, as alleged in the indictment."

15.

Because the Court erred in not charging the jury, a written request having been properly presented, as follows:

"If you believe that defendant's officers who sold the sugar described in the indictment acted in good faith and believed that it had the right to sell sugar at the price it was sold, you will find the defendant not guilty."

16.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"If the evidence fails to convince you beyond a reasonable doubt that defendant acted wilfully, as 'wilfully' has been defined to you, you will find the defendant not guilty.

17.

Because the Court erred in charging the jury, exception being properly taken, as follows:

"The word 'wilful' was read to you from the statute. There has been some discussion about that. Wilful means a deliberate purpose to do the thing that was done. It means that there wasn't any mistake about it or any ac-

cident that got a man into something he did not intend. It does not mean in this connection that the defendant knew or believed that what he did was just and reasonable. If in point of fact the charge made was unjust and unreasonable, and unjust and unreasonable beyond a reasonable doubt in your opinion, and they deliberately made that charge wilfully, then there would be a wilful exaction of an unjust and unreasonable charge within the meaning of this statute. I call your attention to that meaning of the word 'wilful,' because there has been some discussion about it. Whether or not there was any accident or misfortune or misunderstanding that might render the making of an unjust and unreasonable charge not wilful under the circumstances in this case, it is for you to say, or whether the defendant did make wilfully an unjust and unreasonable rate or charge, as set out in the charge. If so they are liable to be convicted under this indictment, and if not they are not liable to be convicted, of course.

18.

Because the Court erred in excluding testimony for that during the trial of said case, counsel for the defendant, Oglesby Grocery Company, in cross-examining J. E. Raley, a witness for the Government, asked said witness if the price of salmon in Atlanta had fallen during the year 1920.

Counsel for the United States objected to said question and urged that the same was immaterial and irrelevant.

Said objection was then and there sustained by the Court, who refused to permit the witness to answer the question.

Counsel for defendant, Oglesby Grocery Company, stated that he expected to prove by the witness that the price of salmon had gone down in Atlanta since January 1, 1920, that wholesale grocers in Atlanta had been compelled to sell salmon at less than cost and had thereby lost money.

To the ruling of the Court in refusing to permit the witness to testify as stated, counsel for defendant, Oglesby Grocery Company, plaintiff in error here, excepted and said exception was noted and allowed.

19.

During the trial of said case, counsel for the defendant, Oglesby Grocery Company, offered to prove by E. M. Hudson, A. W. Walker, R. W. Davis, H. Y. McCord, H. L. Singer, Chas. I. Brannen, Jos. A. McCord, Frank Hawkins, and D. C. McClatchey, that wholesale grocers in Atlanta had during the months of March, April and May, 1920, lost money on canned fish, cheese, lard, lard compounds, and other commodities, because the price of said commodities had gone down after their purchase by wholesale grocers.

Counsel for the United States then and there objected to said question as to each of said witnesses, because the same was immaterial and irrelevant.

Counsel for defendant, Oglesby Grocery Company, stated that he expected to prove by each of said named witnesses that during the months of March, April and May, 1920, the prices of the named commodities had gone down; that grocers had to go down with the market, selling at less than cost, and had, therefore lost money.

The Court ruled that the objection was good and declined to permit the introduction of the testimony.

To this ruling counsel for Oglesby Grocery Company, plaintiff in error here, then and there excepted and said exception was noted and allowed.

20.

Because the Court erred in not granting the motion to direct a verdict for the defendant below, plaintiff in error here, on the ground of the written motion seasonably filed, asking such direction, because there was no legal testimony showing the commission of any crime.

SECTION 3. ARGUMENT AND AUTHORITIES, THIRD GROUP OF ERRORS.

Wilfully.

The statute requires that the act be done wilfully, the pleader followed the statute in the indictment.

By written request set out in error No. 14, copied above, plaintiff in error asked that wilfully be defined.

The definition asked is derived from that used in:

King v. State, 103 Ga. 263, 265;

Felton v. United States, 96 U. S. 699, 703, 24 L. Ed. 875;

Spurr v. United States, 174 U. S. 728, 736; 43 L. Ed. 1150, 1153, 19 Sup. Ct. 812.

Request was also made (errors Nos. 15, 16, *supra*) to charge that if the sale was made in "good faith" and under the belief that the right existed to "sell sugar at the price it was sold", or if proof failed to establish wilful

action, there should be a verdict of not guilty. These charges being refused, the Court (error No. 17, *supra*) gave a confused definition of wilful, but said, as nearly as a definite meaning can be gathered from the language used, that if the charge or selling price was made without mistake or accident, was knowingly made, was unjust and that plaintiff in error "deliberately made that charge *wilfully*", the act would be "wilful". The Court seems to mean that if there was no accident or mistake, the act was wilful. Some person in the name of Oglesby Grocery Company did knowingly and deliberately sell sugar at 20 cents a pound, which, according to the language of the Trial Judge, made the act wilful. The Court misses the point. Knowingly and deliberately to sell is not the same as knowingly and deliberately to sell at an unreasonable charge. It was thought the sale was made at a reasonable rate or charge. That issue the Court's charge excluded from the consideration of the jury.

Merchants traveling through an uncharted and pathless economic field should not be punished for an innocent and unintended error in judgment. With no standard to guide, the jury is given a roving commission to seek the goal, "just and reasonable;" and if the goal found happens to be different from the one the merchant in an honest effort finds, the merchant, who knowingly acts on what he finds, is, according to the charge, a criminal.

Were the things which constitute the crime known, the doing of those things deliberately and knowingly might be wilful; when both the acts and the consequences are unknown and unknowable prior to a decision by a jury, to constitute wilfulness, there must be something more than is included in the definition of the trial judge.

Plaintiff in error was presumed to know the law, but was not presumed to know what was just and reasonable.

In the realm of ethics there are wide differences of opinion. With unanimity so far as this record shows merchants believe and have always believed and practiced the principle that it is just and reasonable to sell their goods for value. Courts have approved the same principle. Plaintiff in error took that price for its property which it believed was its right. This is not a mistake of law. The rule applicable was stated by Coleridge, Judge, in *Reg. v. Reed*, C. & M. 306, 307, 41 E. C. L. 170, as follows:

> Ignorance of the law cannot excuse any person; but at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as, if a person takes what he believes to be his own, it is impossible to say that he is guilty of felony.

Whoever sold this sugar in the name of Oglesby Grocery Company followed what was the custom in the business in which that Company was engaged. There was no deviation from "what is usual," from the "normal and customary course," or from the usual and established scale of charges and prices. (These quotations are from the trial judge's opinion in this case, record bottom of page 7 and top of page 8.) Such sale was made in conformity with the stronger rule of the canonists, the "common estimation" of what was just and reasonable (ante p. 25). The rule uniformly adopted by this Court that value means "present value," was obeyed. The Court's charge denied plaintiff in error the right to have custom, the trial Judge's own rule, common estimation, and the law announced by this Court, considered in deciding whether or not there was a wilful act.

(b) *Losses on Commodities Other Than Sugar.*

The wholesale grocery business of plaintiff in error is

an entity and is so treated by the Department of Justice and the Fair Price Committee because each of those agencies denies any consideration to overhead expenses and general losses. What is a reasonable charge for a particular service or a reasonable price for one commodity sold with many others can only be known by considering the business as a whole. Even when all the business is considered it is very difficult to fix a reasonable rate or charge on a single article or for one service.

> *Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 51 L. Ed. 174, 27 Sup Ct. 108.

With an admittedly difficult problem, with no legislative standard to guide, with a wide and uncontrolled discretion in a jury, any light, even a dim one, should be permitted the jury and evidence of general losses should have been received. If a wholesale grocer can not from all his business pay operating expenses and some return on investment, he will refuse longer to serve the public; if he loses because some commodities have gone down in price, he must, and justly and reasonably should, fairly compensate himself in selling those commodities the prices of which have advanced.

Even the stricter rule of the canonists of the 13th century recognized that there should be remuneration for the hazards of business. Cunningham (Growth of English Industry and Commerce, Early and Middle Ages, Part II, Section 84, p. 255) says:

> Mercantile dealings were for the common good of mankind and must be carried on, despite the possible danger. Commerce might be carried on for the public good and rewarded by gain, and it was only sinful if it was conducted simply and solely for the sake of gain. The ecclesiastic who regarded the merchant as exposed to temptations in all his dealings, would not

> condemn him as sinful unless it was clear that a transaction was entered on solely from greed, and hence it was the tendency for moralists to draw additional distinctions, and refuse to pronounce against business practices where common sense did not give the benefit of the doubt. Remuneration for undertaking risk was at first prohibited but the later canonists refused to condemn it.

This Court judicially knows that a partial restriction of the amount of money in circulation and a limitation on the use of money by the Federal Reserve Bank System, aided perhaps by other causes, has resulted in a general fall in prices since January, 1920. Such a result may be beneficial, it is not here material to discuss that issue; but beneficial or not, wholesale grocers who must buy ahead of actual sales to retailers have lost heavily on sugar and on other commodities. This necessarily is true in rapidly falling markets, and the only way a merchant can remain in business is by making a fair average profit. This he can do only by taking advantage of rising prices to offset losses on falling prices.

(c) *Not Shown that the Sales Alleged to Have Been Made Were Made by Competent Authority.*

The indictment alleged that Oglesby Grocery Company was a corporation. The record (p. 22) shows that W. A. Albright was president of that company, and that as president he bought the sugar alleged to have been sold. The evidence further shows that he sold sugar at 20 cents a pound (rec. 22) of the same description as that bought for 16.269 cents. There is no testimony as to who fixed the selling price, or who authorized such sales. Mr. Manget testified that W. A. Albright told the witness that the rulings of the Fair Price Committee would be dis-

regarded (rec. 22). What authority or duties W. A. Albright, president, had was not shown. While this Court has held that a corporation may commit a crime, that holding was made in a case where there was testimony and admissions showing definitely that the act charged was performed

> within the scope of the authority and employment of the agents of the company.
>
> *New York C. & H. R. Co. v. United States*, 212 U. S. 481, 494, 53 L. Ed. 613, 622, 29 Sup. Ct. 304.

Section 23 of the Food Control Act, under which this plaintiff in error is indicted, for a violation of section 4 thereof, reads:

> The word "person", wherever used in this Act, shall include individuals, partnerships, associations, and corporations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any official, agent, or other person acting for or employed by any partnership, association, or corporation, *within the scope of his employment or office*, shall, in every case, also be deemed the act, omission, or failure of such partnership, association, or corporation as well as that of the person.

Is it the law that "President" connotes the power to fix selling prices?

PART V.

Fourth Group of Errors, Constitutional Questions.

Section 1. Statement of This Part of Case.

By demurrer and by motion to direct a verdict, it was contended in the Court below that the statute under which this indictment was found is unconstitutional and void. Detailed specifications in support of such contentions were made and exceptions reserved (rec. 71, 72) and such specifications appear in the assignment of errors. (Rec. 17, 18.)

Section 2. Assignment of Errors, Group Four.

Errors 21, 22 and 23 of the assignment are directed to this issue and are:

21.

Said Court erred in not sustaining the demurrer to the indictment filed by Oglesby Grocery Company, plaintiff in error, the law on which said indictment is based being void, because in conflict with the Constitution of the United States.

22.

Said Court erred in not directing a verdict for defendant, a motion in writing having been made, prior to the argument before the jury and prior to the submission of the same to the jury, asking that such direction be given

because Section 4 of the Act of August 10, 1917, as amended by the Act of October 22, 1919, the statute under which the indictment in this case was found and prosecuted, is unconstitutional and void and in conflict with the Constitution of the United States.

23.

The Court erred in not directing a verdict for the defendant below, plaintiff in error here, a written request having been seasonably made, and in submitting the issue to a jury; because the law under which the prosecution was had, violates the Constitution of the United States in the following particulars, to-wit:

(a) Conditions existing on April 13, 1920, did not justify the employment of the war powers of the Constitution.

(b) The Act is an unconstitutional attempt to delegate the legislative powers of Congress.

(c) The Government in the indictment and on hearing relies on a price fixed by an alleged Government agency, and as no hearing was had, fixing said price, and the law and facts were disregarded in fixing such price, the defendant is denied due process of law, and the equal protection of the law.

(d) Said law is in violation of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, in that it denies to citizens of one State privileges and immunities granted to citizens of other States.

(e) Said statute is void, in violation of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States for that the statute, as administered, denies the equal protection of the laws, and is not uniform in its application throughout the several States of the Union.

(f) The statute under which this indictment is found is void in violation of the due process clause of the fifth amendment to the Constitution in that it does not operate on all alike and is so wanting in a basis for classification as to produce such a gross and patent inequality as inevitably leads to a denial of due process to the defendant below, Plaintiff in error here.

(g) Said statute is void, because in violation of Article 5 of the amendments to the Constitution of the United States and deprives defendant below, plaintiff in error here, of its property without due process of law, and takes its property for public use without any and without just compensation.

(h) Said statute deprives persons of property and takes property without just compensation, for that the value of such property is not considered, and only the cost thereof is taken as a measure of value, and thus violates Article 5 of the amendments to the Constitution of the United States.

(i) Said statute is void and in violation of Article 5 of the amendments to the Constitution, in that it seeks to take a citizen's liberty and property without due process of law and indictments thereunder are void in charging an offense without adequately defining the offense.

(j) Said statute and the indictment drawn thereunder violate the sixth amendment to the Constitution of the United States for that neither informs defendant "of the nature and cause of the accusation."

(k) Said statute is unconstitutional and void, because a judicial determination of what is a reasonable price is "beset by such deterrents," as to deprive defendant of its constitutional right to due and equal process of law.

Section 3. Summary of Contentions Relating to the Constitution.

The specific contentions as to the constitutional provisions violated by the Act relied on by the Government may be briefly stated as follows:

(1) The conditions calling into force the war powers of Congress, latent in times of peace, did not exist at the time the crime was charged to have been committed.

(2) The statute is an attempted delegation by the Congress of its legislative powers.

(3) Equal privileges and immunities are denied.

(4) Private property is taken for public use without just compensation, or due process of law.

(5) Neither the statute nor the indictment informed accused of the nature and cause of the accusation.

(6) The uncertainty of the meaning of the statute and the penalties which an error might entail beset an accused with such dangers in exercising the right to due process of law as to deprive plaintiff in error of that right.

These several specifications are related and except the first, although in somewhat varying degrees, rest upon the fact that the statute is vague, indefinite and uncertain.

Section 4. Brief of Argument, Group Five of Errors.

Individual discussion of each specification will follow, but preliminary thereto a brief historical sketch of some former attempts to regulate rates, charges and practices will not be without value.

(a) *History of Regulation of Business.*

(1) *General History.*

Augustine, in the third century, argued for a *justum pretium*, but his statements were moral and religious and enforcible only by religious sanctions, and the pious author recognized the moral and religious right to sell a thing for its "worth." Ashley Economic History, Vol. 1. Part 1, p. 134. At that time and before, the Roman law left the fixation of prices to the "higgling of the market." Justinian Digest IV, iv, 16 (4) xix, ii 22 (3). Maine, Ancient Law, 261.

Later, S. Thomas Aquinas, as well as the other canonists, contended for a just price, but gave no definition thereof.

England for centuries attempted to regulate trade. There were assizes of wages, of beer, and of bread. These as to beer and bread dealt principally with standards of measurement, with weight and with quality, although prices were assized or fixed. There was nothing indefinite as to the price of commodities or the rate of wages; and, however despotic the King was, there was opportunity for the trader or wage earner to be heard.

Usually prices were fixed by the interested Gild by the clerks of the market, the justices of the peace or by the mayor and common council, all except the gilds being aided by special juries who were acting under specific statutory power, authorizing the holding of hearings and the fixing of prices and wages. In all cases there was some hearing and the price fixers had or obtained some definite knowledge of the facts constituting a reasonable price, and a definite price was named.

The statute of 1534

> gave powers for settling the price of victuals by authority. (Cunningham Growth of English Industry and Commerce, Modern Times, Part 1, Sec. 173, p. 92.

By proclamation in 1618 the King directed the

> "Clerke of Our Market" to "set reasonable and indifferent (non-discriminatory) rates and prises upon victuals and other provisions."

The times and place of holding the Court were fixed by the proclamation and the "Clerke of Our Market" was directed to make his inquiry

> by the oath of twelve men at the least to be impanelled. (id. pp. 94, 95.)

A form used by the justices of the peace is quoted by Cunningham (id. part 2, pp. 887, 888) showing how wages were rated in the seventeenth century. This in part reads:

> At the general quarter sessions of the Peace, of our Sovereign Lord the King, held for the County of Middlesex at Westminister in the said county, upon ---------- next after the Feast of Easter (to-wit) the ---------- day of ---------- in the ---------- year of the reign of our Sovereign Lord Charles the Second, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, etc., the ---------- The rates of servants wages, labourers, workmen and artificers (in pursuance of the Statute of the Fifth of Queen Elizabeth, in that behalf made and provided) are rated and assessed by the Justice of the Peace of the said county

at the said sessions assembled (calling to their assistance some others of the discreet inhabitant of the said county) as hereafter followeth:

And it is ordered by the said justices, that the sheriff of the said county shall cause the said rates to be proclaimed and published according to the statute in that case also made and provided; and that after such proclamation and publication made of the said rates, that no person whatsoever (which may be therein concerned) shall (this present year) presume to give, allow, demand, receive, or take any greater wages than such as are mentioned in the said rates; neither shall any master, or mistress, entertain or put away any servant, workman, or labourer; neither shall any servant, workman, or labourer, depart from any master or mistress, which may be mentioned or intended in the said Statute of the Fifth of Queen Elizabeth or any other statute in that behalf provided, without due observation of the said statutes, under such pains and penalties as are therein respectively mentioned.

Prices were arrived at in a similar way, except the Gild of merchants affected was usually called on to determine what the prices should be.

So far as investigation shows, the statement is justified that there was always a hearing, a definite rate or price fixed and a public proclamation thereof.

In this case there was no hearing and no proclamation of what had been fixed, and from the indictment it seems the district attorney himself did not know what profit had been fixed or what cost meant.

Some of the district judges in seeking reasons to sus-

tain the Food Control Act, have used the analogy of the common law and statutory crimes of engrossing, forestalling and regrating. These were not price fixing regulations, although their purpose, like our anti-trust statutes, was to prevent unfair prices.

"Engrossing" meant buying with intent to resell and was made a crime in order to prevent the small farmer or craftsman from selling to a middleman who might engross or monopolize the commodity. "Forestalling" meant to go out and meet the seller before he reached the market and buy his goods or dissuade him from coming to the market, the effect of forestalling being similar to that of engrossing. "Regrating" was a lesser form of engrossing; engrossing being wholesaling, and regrating, retailing. The regrator could not sell in the same market or within four miles thereof. These laws were for the protection of both seller and purchaser.

George 3. C. 71 repealed some of these statutes.

> As being detrimental to the supply of the laboring and manufacturing poor of the Kingdom;

and by 7 and 8 Victoria, C. 24, both the common law and the statutory offenses were abolished. Bishop Criminal Law, Vol. 1, Secs. 518 (2), 524 (1).

(2) *Federal Regulation.*

The outstanding illustration of rate fixing, there has, prior to Food Control Act, been no price fixing by Congress, is the Interstate Commerce Act. The language of Section 4 of the Food Control Act (ante 2, 3) is similar to the Commerce Act. In the Commerce Act "all charges * * * * shall be just and reasonable" (section 1) "unjust discrimination" is prohibited (section 2) and "any

undue or unreasonable preference or advantage" is made unlawful (section 3). The Commerce Act provides adequate machinery for notice and hearing before the Commission and for a review before the Courts. The Act is valid but its enforcement must be in harmony with constitutional requirements. (See discussion under the contention that a hearing must precede price fixing (ante 20-22).

(3) *State Regulation.*

The history of the regulation of charges in the United States can to a large extent be gathered from the decisions of this Court. The Granger cases (1) mark the first general step. These cases are based on the principle as stated in the Munn case, p. 130, that "when private property is devoted to a public use it is subject to public regulation." Illustrating the principle Lord Ellenborough (Munn Case 127, 128) is quoted to the effect:

> There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.

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(1) Granger Cases—

Munn v. Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa (v. Cutts), 94 U. S. 155, 24 L. Ed. 94; Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona & St. Paul R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102.

Mr. Justice Field did not concur in the conclusion in this case, and in an *argumentum reductio ad absurdum*, said:

> I deny the power of any Legislature under our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as in all articles, and the prices of everything from a calico gown to a city mansion may be the subject of legislative direction.

The decisions in the Railroad Commission Cases, (2) *Dow v. Beidelman* of 1888, the Minnesota Case of 1890, the Texas Commission Case of 1894, the Turnpike Case of 1896, *Smyth v. Ames* in 1898, the National City Case in 1899, the Water Rate Cases of 1903, the Water and Gas Cases of 1909, and the several cases reaching the Supreme Court in 1913 (3) are corollaries of the Granger Cases.

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(2) Railroad Commission Cases—

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 1191; Stone v. Ill. Cent. R. Co., 116 U. S. 347, 29 L. Ed. 650, 6 Sup. Ct. 348, 1191; Stone v. New Orleans & N. E. R. Co., 116 U. S. 352, 29 L. Ed. 651, 6 Sup. Ct. 349, 391.

(3)—

Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028.

Chicago, M. & St. Paul R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047.

Covington & L. Turnpike R. Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198.

Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.

Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. 531; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, probably enlarges the territory over which regulation theretofore had been extended, but provides restrictions on that regulation not necessary in regulating common carriers and monopolies. Fair returns on present value is required by the decision in the Stock Yards Case, and the Court classified those who might be regulated into two groups, (1) Where "the owner has intentionally devoted his property to the discharge of a public service", and (2) where the owner "has placed his property in such a position that the public has become interested in its use". The Court said:

> In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of

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Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; Wilcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192. Other illustrative cases are:

Budd v. New York, 143 U. S. 517, 36 L. Ed. 247, 4 I. C. R. 45, 12 Sup. Ct. 468; Brass v. North Dakota ex rel. Stoesser, 153 U. S. 391, 38 L. Ed. 757, 4 I. C. R. 670, 14 Sup. Ct. 857; People v. Budd, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670; Lake Shore & M. S. R. Co. v. Cincinnati S. & C. R. Co., 39 Ohio St. 604; State ex rel. Attorney General v. Columbus Gaslight & Coke Co., 34 Ohio St. 572, 32 Am. Rep. 390; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; Baker v. State, 54 Wis. 368, 12 N. W. 12; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490; Girard Point Storage Co. v. Southwalk Foundry Co., 105 Pa. 248; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Brockbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co., 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146; Spring Valley Water-Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. 336; Atlantic C. L. R. Co. v. North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398.

> the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is bound by all the conditions of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all state regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privilege of others engaged in mercantile business.

In *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612, a majority of this Court, it has been claimed, enlarged the field of regulation, but if so there was an express limitation "to the regulation of the insurance", (p. 415) and the Court distinguished between that business and ordinary commercial transactions. The Court (p. 414) said: "It (insurance business) is therefore essentially different from ordinary commercial transactions". And further (p. 416):

> We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is

> powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character.

If, as indicated in this quotation, monopoly is the basis for the regulation of insurance companies, the case does not enlarge the field of regulation.

It will also be noted that in the German Alliance Insurance case the statute involved gave ample opportunity for a hearing and a definite fixation of price.

A general statement of State statutes regulating public service corporations is given by this Court in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

(*b*) *Summary of the Principles of Federal and State Regulations of Business.*

In the cases cited above showing the history of regulation the power to regulate was based on the commerce clause, giving power to Congress or the police powers of the states; but however based, the exercise of the power must be had conformably to constitutional requirements.

Generally, State statutes, like those of the Federal Government and of England, recognized the principle that such power could not be arbitrarily exercised, but that constitutional *methods* must be followed. There are three outstanding instances where such recognition was not had; and, as a consequence, the statutes were not enforced. These cases are:

> *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. 679;

Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 584;

Louisville & N. R. R. Co. v. Commonwealth of Kentucky, 98 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457.

In the first of these cases the statute was essentially similar to Section 4 of the Act involved in the instant case. In a learned and able opinion that statute was held void. The decision met the approval of this Court, and, as indicated by the then Chief Justice, not unlikely served as a warning to other State Legislatures in framing regulatory statutes.

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 336, 29 L. Ed. 636, 646, 6 Sup. Ct. 334.

In the second case, Circuit Judge, later Mr. Justice Brewer, cited text writers and cases sustaining the principle that criminal statutes must not be "cunningly and darkly penned."

The third case is one decided by the Supreme Court of Kentucky. A Kentucky statute making criminal a charge of "more than just and reasonable" was held invalid; and the Court said:

> No case can be found, we believe, where such indefinite legislation has been upheld by any court when a crime is sought to be imputed to the accused.

These wholesome decisions, and the similar cases of *United States v. Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68; *Czarra v. Board of Supervisors*, 25 App. D. C. 443; *Ex Parte Jackson*, 45 Ark. 158, and *United States v. Tozer*, 52 Fed. 917, had their effect, and little such legislation as was condemned therein has been en-

acted. The Georgia Legislature disregarded these decisions, and a statute making it a crime to operate an automobile at an unreasonable rate of speed was held void.

Hayes v. State, 11 Ga. App. 371, 75 S. E. 523;
Empire Life Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120;
Strickland v. Whatley, 142 Ga. 802.

(c) *The Statute Here Discussed Is Invalid Even if the Congress Had Power to Fix Prices.*

There is ample authority to support a contention that ordinary mercantile transactions are free from governmental regulation and that individuals engaged in such transactions have liberty to fix their prices at such standard as may be permitted by open competition and the "higgling of the market." Such a contention is made in the assignment of errors and is supported by the cases already cited. However, even if Congress had the power, by a definite statute providing for an adequate hearing, to regulate prices, such power was not exercised in the Food Control Act. The subsequent discussion therefore will be directed to the unconstitutional exercise of the claimed power.

SECTION 5. THE WAR ENDED PRIOR TO APRIL 13, 1920.

(a) *Principles of Law Applicable.*

In *Hamilton v. Kentucky Distilling Co.*, 251 U. S. 146, 64 L. Ed. ——, this Court proceeded on the assumption that the war power of Congress might end prior to a proclamation of peace. As reasons why that principle should not then be applied the Court mentioned that:

(1) The treaty of peace had not been concluded.

(2) That the railroads were still under National control.

(3) That other war activities had not been brought to a close.

(4) That the man power of the nation had not been restored to a peace footing.

Only one, the first, of these reasons existed April 13, 1920.

The opinion in the Kentucky Distilling case was rendered December 15, 1919, and the executive acts there relied on to show a termination of the war were dated November 18, 1919, or prior thereto.

On February 28, 1920, the railroads were restored to their owners, and prior to April 13, 1920, war activities had ceased and the Army and Navy were on a peace footing. The German and Austrian-Hungarian Empires had ceased to exist and the only reason why a peace proclamation had not been made was because the Executive and the Senate could not agree as to the form which a peace treaty should take. The successors to our former enemy governments had signed peace treaties and the treaties were functioning.

In the "absence of *more certain criteria* of equally general application", a proclamation terminating a war will be accepted. *Freeborn v. The Protector*, 12 Wall. 700, 20 L. Ed. 463.

Applicable to the Food Control Act, the President has, by several proclamations, shown in effect that the war power of Congress was no longer available.

(*b*) *Proclamations of the President.*

1919.

March 19, 1919, pp 1, 2, licenses for "distributing fresh, canned, or cured beef, pork or mutton or lard and all regulations under the same are cancelled.

May 31, 1919, pp. 9, 10, hereafter licenses unnecessary for dealers in cotton seed oil, cotton seed meal, etc., *lard substitutes* and all other cotton seed products.

June, 1919, pp. 16, 17, a similar proclamation as to rice and rice flour.

November 21, 1919, pp. 33, 34, prohibition of importing and exporting wheat and wheat flour discontinued and cancelled.

July 31, 1919, p. 25, the President, referring to rules and regulations governing flying by air craft, said:

> The necessity as a war measure for the continuance and effect of such rules and regulations has come to an end.

On March 23, 1920, coal was released from the fuel provision of the Act of August 10, 1917.

SECTION 6. ADMINISTRATIVE AGENCIES ARE GIVEN LEGISLATIVE POWERS.

Statement.

That Congress having prescribed rules, may delegate to a Commission the ascertainment of facts, is not questioned. The chief example of such legislation is the Interstate Commerce Act. By an unbroken line of authorities from

the times of Lord Hale to the present, it has been required that in regulating rates and charges there must be a fair return on actual present value. This principle governs all administrative agencies. Here there is no fixed principle. Some courts and some administrative agencies have adopted the rule that present market value is the basis. In this case cost was the basis. Judge Pollock, in *United States v. Robinson*, decided June 12, 1920, not yet reported, held that an indictment which failed to state replacement or market value was void whether or not the Food Control Act was constitutional. Judge Pollock said:

> All that is here charged against defendants is a conspiracy to charge excessive prices for the necessary commodities by them sold. What constitutes this excessive price is no where defined, stated or charged. What the market price of the necessary commodity was at the time is not stated or charged. What the true or intrinsic value of this necessary food product in comparison with other necessary food commodities is not stated. In certain of the cases at least defendants are charged as wholesale merchants dealing or trading in this necessary food product at wholesale, in which event, to remain in such business, of necessity, they must continue to replace the stock of this community as exhausted by sales, yet, in no manner or way is such replacement cost or value stated."

Judge Edwin R. Holmes, in *Kennington v. Palmer*, May 8, 1920, not yet reported, said:

> The next question is whether or not an unjust or unreasonable rate or charge has been made. In deciding this question you will not be concluded by any price or margin of profit fixed or allowed by any committee or agency of the Government, but you will take

into consideration all competent evidence which may be available tending to show what is a just and reasonable charge. The test of reasonableness must be applied to all regulations and orders issued to carry out the act, and any regulation requiring the seller to disregard the *real market value* of the article and to sell at the original price paid therefor plus an arbitrary fixed percentage as profit is unreasonable and void, as in many cases such regulations would confiscate property rights which have become fixed and vested.

You will observe also that Congress has not seen fit to make it an indictable offense to disregard any order or regulation of the Fair Price Committee, but has provided a penalty only for a violation of some provision of the act itself. The price that the merchant paid for his goods is not conclusive, but is a mere circumstance tending to show its present value. Although you may consider the price he paid along with the other evidence, you should consider also, and I think should *give more weight to* the replacement value of the article than to the original cost. Particularly is this true if there has been a material change in the market price of the goods. (Italics supplied.)

In this case the Department of Justice and the Fair Price Committee each fixed an arbitrary price over cost, the prices being different, and cost was differently defined. The trial judge (rec. 76) told the jury:

The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General and also through the agency of the Fair Price Commission at Atlanta. Evidence has been introduced as to what these agencies of the President had determined to be a

fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as *prima facie* evidence as to what the Attorney General and the Fair Price Commission decided was just and reasonable.

(*b*) *Argument and Authorities.*

The Food Control Act, as construed in the lower court, violates every principle of constitutional right. In *Yick Wo. v. Hopkins*, 118 U. S. 356-374, 30 L. Ed. 220, 225, 227, 6 Sup. Ct. 1064, this Court said:

> The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to man the blessings of civilization, under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

The Court then quoted from *Baltimore v. Radecke*, 49 Md. 217, as follows:

> It commits to the unrestrained will of a single pub-

> lic officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. It is clear that giving and enforcing these notices may and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefitted by what is thus done to their neighbors; and, when we remember that this action, or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.

This Court, following the quoted language from the Maryland Court, *supra*, said:

> Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust

and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

In *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 591, 594, 12 Sup Ct. 764, this Court said:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient.

And further the Court said:

> Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.

See also Part II, Section 2, Subdivision (e) (ante 22-27).

Section 7. Equal Privileges and Immunities Are Denied.

(a) *Statement of This Part of the Case.*

The statute sections 4 and 5 excepts farmers and others from its operation.

The President (ante 62) has excepted such neces-

sities as meat, lard compounds made from cotton seed oil, rice and flour.

An agent for the Department of Justice in Texas as shown by a declaration not admitted to the jury (rec. 40) specifically authorized the use of replacement value. The latest invoice and not cost controls the War Department's selling prices (rec. 40) Judge Holmes in Mississippi (ante 63, 64), Judge Lewis in Colorado, and Judge Pollock in Oklahoma (ante 63), held that replacement value was to be considered.

This Court knows judicially what the agencies of the Government have done, if such agencies have any legal functions, and from that judicial knowledge is familiar with the fact that the Department of Justice long refused to make any ruling as to what was a reasonable profit, the practice was to refer all requests for information to the various Fair Price Committees and District Attorneys. These all had their own ideas and hardly any two localities had the same rule.

It was not until after the sales here charged to have been made were made (rec. 22, 31) that the Attorney General stated any rule, and that rule was that the profit on sugar should be 1 cent a pound over cost. Prior to this date the committee in Atlanta had fixed .65 of a cent, 1 cent, 1¼ cents and 1½ cents at different times (rec. 47). The Attorney General defined cost one way (rec. 43, ante 5) and in Atlanta cost meant quite a different thing. Merchants were committed to the government of men, to uncertainty and to differing rules of conduct, such rules depending upon the fiat of each particular agency.

(b) *Argument and Authorities.*

Paragraph 1, Section 2, Article 4, of the Constitution reads:

> The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

Some citizens could get a profit over market value. Plaintiff in error was told by the price fixer in Atlanta that such a privilege was denied it; citizens of those States where the definition of cost given by the Attorney General was obeyed had one cost, Plaintiff in error had another. These and other denials of equality under the law are perhaps inseparable from any statute so vague and indefinite as the one under discussion, but such inequality however caused, violates the Constitution of the United States.

In *Ward v. Maryland*, 12 Wallace 418, 20 L. Ed. 449, 453, Article 4 of the Constitution was considered, and this Court said:

> Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy these defects in the prior system.
>
> Evidence to show that the framers of the Constitution intended to remove those great evils in Government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, showing

> that Congress, as well as the states, is forbidden to make any discrimination in enacting commercial or revenue regulations * * * *.
>
> Much consideration was given to those clauses of the Constitution in the Passenger Cases, 7 How. 400-414, and they were regarded as limitations upon the power of Congress to regulate commerce, and as intended to secure entire commercial equality.

In the Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394, this Court discussed constitutional rights at length. Beginning at page 75 of the official report, page 408 of the law edition, the Court points out that the Articles of Confederation contained a clause protecting privileges and immunities. Cases are cited showing that these words were intended to protect the citizens against special laws and regulations, and that the privileges and immunities of citizenship were the same throughout the country.

Among other privileges named, the Court places the right,

> to pursue a lawful employment in a lawful manner without other restraint than such as equally affects all persons.

Further speaking, p. 96 official, 415 law edition, of the paragraph of the 4th article, referred to above, the Court said:

> It is a clause which insures equality in the enjoyment of these rights between citizens of several States while in the same State.

And at page 101 offical report, 416 of the law edition, the Court shows that the 4th article restrains Congress as the 14th amendment restrains the States. At pages

109 and 110 of the official edition, 419 of the law edition, expressions are used as follows:

> "Equality of right among citizens."
>
> "Equally upon all others of the same age, sex and condition."

And said the Court:

> This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country, our government will be a republic only in name.

In *Blake v. McClung*, 172 U S. 239, 43 L Ed 432, 19 Sup. Ct. 165, the Slaughter House Cases are discussed and the principles above referred to reiterated.

The exemption of farmers and others is a further unlawful discrimination.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, where, in referring to the Fourteenth Amendment, which, as shown above, is comparable to Article 4, this Court said:

> No impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, 359. This language was cited with approval in *Yick Wo. v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6 Sup. Ct Rep. 1064, 1070, in

> which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws". In *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. Ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed or by the territory within which it is to operate, "shall be treated alike under like circumstances and conditions both in the privileges conferred and the liabilities imposed". "Due process of law and the equal protection of the laws", this Court has said, are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the "powers of government". *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485, 487, 14 Sup. Ct. Rep. 570, 572. Many other cases in this court are to the like effect * * * *. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

On these principles the Illinois anti-trust laws which exempted farmers were held invalid.

Judge Anderson, *United States v. Armstrong*, 265 Fed. 683, fully sustains the argument on this point.

SECTION 8. ARBITRARILY TO DEPRIVE AN OWNER OF PART OF THE VALUE OF HIS PROPERTY IS TAKING PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, AND DENIES DUE PROCESS OF LAW.

(a) *Statement of This Part of the Case.*

The findings of the Presidential agencies, made *prima facie* correct by the charge of the Court, are conflicting, but each takes the part of the property of Plaintiff in error, which is the difference between cost and value. On the day it is charged that Plaintiff in error sold sugar for 20 cents a pound, the value exceeded that price (ante, p. 22-23).

(b) *Argument and Authorities.*

While a rule of evidence making some facts *prima facie* evidence may be valid, when the rule in substance excludes consideration of a definite property right it is not valid. No standard of reasonableness is provided for in the statute. The only guide that was given the jury was the price fixed; and although that guide was said to be *prima facie* only, there being no other possible guide, *prima facie* became conclusive. A rule of evidence which actually concludes a jury is invalid, and whatever the form, the rule here is the only rule and therefore a conclusive rule.

Little Rock, etc., R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55.

This issue has already been discussed and further discussion would be but a repetition (ante 28-32).

SECTION 9. THE STATUTE AND THE INDICTMENT ARE VOID FOR UNCERTAINTY, VAGUENESS AND INDEFINITENESS.

(a) *Argument and Authorities Generally.*

The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute.

Ballew v. United States, 160 U. S. 187, 197, 40 L. Ed. 388, 393, 16 Sup. Ct. 263.

Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute.

United States v. Brewer, 139 U. S. 278, 288, 35 L. Ed. 190, 193, 11 Sup. Ct. 538, citing

United States v. Sharp, Pet C. C. 118;

United States v. Lacher, 134 U. S. 624, 33 L. Ed. 1080, 1083, 10 Sup. Ct. 625.

These elementary principles are necessary in any free government and are not directly disputed. They were, prior to recent months, universally applied by the Courts of this country. Recently some of the Judges of the District Courts and of a Circuit Court of Appeals have held the statute here under discussion valid; thereby it is submitted, disregarding these rules.

Judge Pollock, *United States v. Robinson*, — Fed. —, not yet reported, did not hold the statute void but did

hold that an indictment charging the crime in the language of the statute was void. He said:

> All that is here charged against defendants is a conspiracy to charge excessive prices for the necessary commodities by them sold. What constitutes this excessive price is no where defined, stated or charged. What the true or intrinsic value of this necessary food product in comparison with other necessary food commodities is not stated. In certain of the cases at least defendants are charged as wholesale merchants dealing or trading in this necessary food product at wholesale, in which event, to remain in such business, of necessity, they must continue to replace the stock of this commodity as exhausted by sales. Yet, in no manner or way is such replacement cost or value stated * * * *.
>
> What is an excessive price or a low price for any commodity, in all reason, is, and ever must continue to be one of comparison, only. "There is nothing either good or bad, but thinking makes it so." Being a matter capable of ascertainment only by comparison, and incapable of being judged by any fixed standard, and in the end, controlled by the law of supply and demand, can it be possible for the law making power, in the first instance, to create a criminal offense in such vague, indefinite, uncertain language as is that found in clause "e" of the amendment, above set forth; and, having done this, again, is it possible under the settled principles of criminal practice and procedure in the courts of justice of our country, guided by a written constitution, to charge a citizen with the commission of a crime in the vague, indefinite, uncertain, general language of this enactment? I do not believe, and if it be so held, now or in the future by our

courts, then our much vaunted freedom of the individual citizen from oppression will become as unstable, uncertain and untrustworthy as hieroglyphics written in mud.

(*b*) *Argument and Authorities of the Trial Judge.*

The opinion on demurrer in this case of the Honorable Samuel H. Sibley, District Judge, is as well argued as and is more comprehensive than most of the opinions heretofore rendered holding this statute valid and covers the grounds of such other opinions so fully that a discussion of the arguments of Judge Sibley makes unnecessary detailed reference to other opinions. Judge Sibley's opinion is copied in the record (pp. 4-8) and reported in 264 Fed. 691. This opinion may fairly be summarized as presenting six arguments in support of the validity of the statute:

1. Magna Carta does not grant both trial by jury and the right to judgment according to the law of the land.

2. Many civil rights are dependent on a determination of what is meant by "reasonable time," "reasonable care," etc.

3. Criminal statutes, long in force, like those prohibiting "opprobrious words," "obscene language," "indecent or disorderly conduct," etc., have been sustained.

4. The consequences of homicide and other acts are uncertain, such consequences being criminal or not as a jury may determine.

5. The Articles of War are indefinite.

6. *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 780.

This grouping of the argument of the trial judge is not intended to state his arguments, but merely to divide a discussion thereof.

(1) *Magna Carta.*

The learned trial judge quotes Magna Carta as follows:

> No free man shall be taken or imprisoned * * * * save by the lawful judgment of his peers, *or* by the law of the land.

He then comments by saying that the language seemingly expresses content at a condemnation either by a jury (presumably without law) or by law, without a jury. Judge Sibley used the popular translation of Magna Carta; but his conclusion disregards the context and the fundamental purpose of the Great Charter and the popular version is not the one accepted by the best scholars.

The conclusion of Chapter 39 of the Magna Carta reads:

> "Nisi per legale indicium parium suorum *vel* per legem terrae."

Latin lexicons, especially unabridged ones, translate in some instances "vel" as *"and"*. Among others, Leverett's Latin Lexicon, where it is said "vel is used with a copulative force when it may be rendered *and*". This Lexicon cites as authority quotations from both Vergil and Cicero.

Pollock and Maitland, History of English Law, volume 1, page 173, note 3, after quoting the conclusion of chapter 39, above, say:

In mediaeval Latin "vel will often stand for 'and'."

The Encyclopedia Britannica, in the article on Magna Carta, translates "vel" as "and."

(2) *Uncertainty in Civil Proceedings.*

This subdivision of the trial judge's argument is answered by the fact that the sixth amendment applies only to criminal prosecutions.

(3) *Some Criminal Statutes Long in Force Are Themselves Indefinite.*

Some of the statutes referred to by the learned trial judge are themselves probably invalid, at least their validity has not been determined by competent authority. Others of these statutes are prohibitions of acts which for centuries have been penalized. "Opprobrious words," "abusive language," "fraud," "deceit," "notorious," "indecent," "obscene," "vulgar," "profane," and similar words have been used in criminal statutes for centuries and thus have gained a definiteness of meaning.

District Judge Woodrough, *United States v. Bernstein*, —— Fed. ——, not yet reported, in discussing this argument, aptly said:

> It must be conceded that many generic, broad descriptions of offenses have become definite and are upheld and enforced and it is not in all cases easy to determine when an accused is informed of the nature and cause of the accusation. It would unduly extend this memorandum to review the many intricate and difficult problems presented to the courts under this constitutional provision. I do not find any adjudica-

tions, however, in the Supreme Court which appear to me to conflict with my conclusion that the law in question contravenes the sixth amendment and is void for that reason.

(4) *The Consequences of Some Acts Are Criminal or Not as a Jury May Decide.*

Using the illustration adopted by Judge Sibley the result of a homicide may be murder, manslaughter, or justifiable homicide, "of which the jury in all cases shall be the judge." Homicide in violation of the statute, is a known and definite crime. It may be that he who does the killing may be uncertain as to the consequences to himself, but when he starts he definitely knows that he is embarking on a criminal journey even though the end of the journey is not discernible. He need not kill.

The merchant must sell his goods, he lawfully may do so; it is only when he exceeds what someone may thereafter say is a reasonable price that he is denounced as a criminal. His journey must be taken and is lawful, but at some unknown and unknowable point he must stop. Clearly there is a distinction between what the merchant does and must do and what the killer does, but need not do.

(5) *The Articles of War.*

In *Carter v. Roberts*, 177 U. S. 496, 44 L. Ed. 861, 20 Sup. Ct. 713, this Court pointed out that the Articles of War are authorized by Section 8 of Article 1 of the Constitution, and that every officer

> Subscribes to these articles and places himself within the power of courtsmartial to pass on any offense which he may have committed in contravention of them.

(6) *The Nash Case.*

In *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 780, the crime charged was a violation of the statute prohibiting restraint of trade. The offense is well known to the law and was a crime at common law. He who seeks to restrain trade knows what he is doing, and that the enterprise is one he need not undertake and one which he undertakes fully cognizant of its dangers. The acts charged in the indictment in the Nash Case are stated clearly and in detail and are all wrongful. The only possible doubt is as to the extent of the effect of such acts. Here the act, that of selling is lawful and right, unless some jury may think the selling rate or charge is unreasonable. In the Nash Case a wrongful act pursued far enough becomes a criminal act; in this case a rightful act is right or wrong, lawful or unlawful, according to the most uncertain of all mental processes, the verdict of a petit jury.

(c) *Authorities Relied on by Plaintiff in Error.*

Perhaps the leading authority directly in point here is that of *United States v. Tozer*, 52 Fed. 917, 4 Int. Com. Repts. 245. Mr. Justice Brewer and Circuit Judge Caldwell there had for consideration a statute substantially similar to the one here under discussion. If the Tozer Case correctly states the law, this case must be reversed. That case cites sustaining authority and there have been several cases following that opinion, some cases distinguishing; but although decided 28 years ago, there is none overruling it. That case cannot be distinguished from this.

This Court first cited the Tozer Case in *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 109, 53 L. Ed. 417, 429.

430, 29 Sup. Ct. 220, and while expressing no doubt as to the correctness of Mr. Justice Brewer's opinion, pointed out the distinction between a case arising under the monopoly statutes and one arising under a rate fixing statute. It was there said:

> But the Texas statutes in question do not give the power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

The next citation by this Court of the Tozer Case was in the Nash Case, discussed (ante, p. 80). The Nash Case was explained as referring to degree and the principle of the Tozer Case was stated by this Court in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223, 58 L. Ed. 1284, 34 Sup. Ct. 853, where the author of the opinion in the Nash Case said:

> The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.

"Real value", which is no less certain than "unreasonable rate or charge" in a criminal statute, was held by this Court to be so uncertain as to make such statute "fundamentally defective".

> *Collins v. Kentucky*, 234 U. S. 634, 638, 58 L. Ed. 1510, 1512, 34 Sup. Ct. 924.

In *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563, this Court discussed a statute which made it a crime to refuse to receive and count the votes of qualified voters. In the course of the opinion Chief Justice Waite stated the principle applicable here:

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government.

That the statute here is void appears from the decision of this Court in the Texas, the Harvester, and the Collins Cases, *supra*, from Bish. Cr. Law, Vol. 1, Sec. 291, and from the cases following:

United States v. Tozer, 52 Fed. 917;

Louisville & N. R. Co. v. Railroad Com. of Tenn., 19 Fed. 679;

Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744, 2 Int. Com. Com. Rep. 584;

Louisville & N. R. Co. v. Kentucky, 98 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457;

United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68;

Czarra v. Board of Supervisors, 25 App. D. C. 443;

Ex Parte Jackson, 45 Ark. 158;

Hayes v. State, 11 Ga. App. 371, 75 S. E. 523;

Empire Life Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120;

Strickland v. Whatley, 142 Ga. 802;

A. M. Halter Hardware Co. v. Boyle, 263 Fed. 134;

United States v. Cohen Grocery Co., 264 Fed. 218;

Retail Dry Goods Asso. v. District Attorney (Colo.), —— Fed. ——;

Detroit Creamery v. Kinney, 264 Fed. 845;

Lambora v. McAvoy, —— Fed. ——, not yet reported;

United States v. Armstrong, 265 Fed. 683.

There have been other holdings by District Judges that the Food Control Act is void for uncertainty, but in many such cases no opinions were filed.

(*d*) *Legislative History of Food Control Act Amendment.*

The legislative history of the Amendment of October 22, 1919, shows its invalidity.

Senators Smith, of Georgia; Johnson, of South Dakota; Thomas, of Colorado, and other Senators stated that the proposed legislation was void because uncertain and discriminatory. (Cong. Rec., Sept. 12, pp. 5620-5623.)

On September 12, 1919 (record, 5622), Senator Gronna being absent, Senator Kenyon, the ranking member of the committee, said:

Mr. Kenyon:

> Mr. President, I do not like the proposed legislation. I do not think anybody is enthusiastic about it. It is difficult legislation. If it was to be permanent legislation it would not secure my vote. But the Attorney General has come to Congress, and the President has done so, asking for this legislation. It is only going to be a period of perhaps 30 days, and in the meantime the Attorney General may be able to accomplish something by it. That is the only justification that I can get into my mind for voting for it.

(c) If, As the Trial Judge Held, the Prices Fixed by Governmental Agencies Are Prima Facie Correct Without a Hearing, Due Process of Law Is Denied Because of Deterrents to a Test.

This principle is definitely established in this Court, *Oklahoma Operating Co. v. Love*, 252 U. S. 331, where, in discussing a less burdensome statute, it was said:

> Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. *Ex Parte Young*, 209 U. S. 123, 147, 52 L. Ed. 714, 723, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 349, 57 L. Ed. 1507, 1510, 33 Sup. Ct. Rep. 961; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 662, 50 L. Ed. 405, 411, P. U. R. 1915 A 106, 35 Sup. Ct. Rep. 214.

CONCLUSION.

Let this brief close with the pertinent statements of Judges Putnam and Bourquin.

Judge Putnam, of the Circuit Court of Appeals, in *United States v. Winslow*, 195 Fed. 578, 587, a case later affirmed by the Supreme Court, said:

> We have lived in so much peace for more than a century under the protection of the constitutional provisions to which we refer that whole masses of citizens and some of their leaders are slumbering in reference to them, while our forefathers who were brought into almost immediate contact with all the devices to which tyranny was accustomed, were fully awake. The courts, however, are not permitted to slumber.

In *Ex Parte Jackson*, 263 Fed. 110, 113, Judge Bourquin said:

> The inalienable rights of personal security and safety, orderly and due process of law, are fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place or occasion, but belong to man, always, everywhere, and in all circumstances. Every nation demands them for its people from all other nations. No emergency in war or peace warrants their violation, for in emergency, real, or assumed, tyrants in all ages have found excuse for their destruction. Without them democracy perishes, autocracy reigns, and the innocent suffer with the guilty. Without them is no safety, peace, content, happiness, and they must be

vindicated, defended and maintained in the face of every assault by government, or otherwise.

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